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time, had no regular constitution, and the decision, as the enunciation of a general principle, was dissented from, in *Jones' Heirs vs. Perry*, 10 Yerg. 70, where a similar act was held void, on the ground that the legislation, not being for infant's benefit, but for the payment of debts to be ascertained, it was an exercise of judicial power. Where the persons, whose land is to be sold, are *sui juris*, however, the reason, and, therefore, the right, of legislative interference

ceases, unless in cases where their assent is expressly shown: *Ervine's Appeal*, 16 Penn. St. 256; *Schoenberger vs. School Directors*, 32 Penn. St. 34; *Kneass' Ap.*, 31 Id. 87; *Powers vs. Berger*, 2 Selden, 358. Though after the lapse of a great number of years, and acquiescence in a sale made under such an act, the assent of such persons may be presumed, at least in a controversey between strangers: *Fullerton vs. McArthur*, 1 Grant's Cas. 232. H. W.

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*In the Massachusetts Supreme Judicial Court, January Term,*  
1861.

LE BRETON vs. PEIRCE, THE OWNERS OF PROPERTY, ETC.

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange.

This case is reported at length in the October number of the *LAW REGISTER*, to which we must refer the reader. The Court, *MERRICK, J.*, in giving judgment, put the case mainly upon the two points referred to in the following note, which was intended to have been published in the same number with the case.

One of the questions involved in this case is of great interest with business men; and it seems almost incomprehen- sible how there should have been so much conflict in the decisions of the courts in this country in regard to it.

It probably may have arisen from not clearly discriminating the precise state of facts upon which the different views found themselves. This will readily be perceived by carefully examining the opinions of the different judges. But we think something of this embarrassment may be got rid of by careful classification.

I. Where the negotiation of the note or bill, as between debtor and creditor, is understood to operate either as conditional payment, or to create an expectation between the parties, that the collection of the principal debt shall be delayed until the time of payment of the collateral security, there can be no question that, upon principle and authority, the creditor must be said to take the paper upon full consideration, and in the due course of business. The conflict in the cases seems to arise upon the question, what is *implied* by accepting a note or bill, on time, for a pre-existing debt then due?

1. This will depend, to some extent, upon commercial usage, and the ordinary course of doing business, and the natural implications, from the mere act of accepting the note or bill, and is, therefore, matter of fact, in part, at least. The implication, as matter of fact, is different, in some respects, whether the new note or bill is for the precise amount of the existing debt, as in *Michigan State Bank vs. The Estate of Leavenworth*, 28 Vert. R. 209; or for a different sum, either more or less, and especially when it is for a less sum. Where the new security is for the precise sum of the debt, and is payable on time, there is, in fact, a very strong implication that the creditor will wait until the maturity of the new security. And in that view the cases all agree that the new security is taken for value, and that all equities in favor of other parties will be excluded. And a

similar implication results where the new security is for a larger sum than the existing debt, as in *Atkinson vs. Brooks*, 26 Vert. R. 569.

2. But where the security is of a different character from the original debt, as where the creditor takes a mortgage from the debtor for the payment of the sum due in six months, it is not understood there is any implication of a contract to delay the collection of the debt of other parties: *United States vs. Hodge*, 6 How. U. S. R. 279.

3. And where the new security is not given in lieu, or on account of the existing debt, but as a mere pledge, the title of the new security remaining in the debtor, and not passing to the creditor, thus making the creditor the mere trustee or agent of the debtor for the collection of the new security, to be applied, when collected, upon the existing debt, between them, as was held in the case of *Austin vs. Curtis*, 31 Vt. R. 64; the cases all agree that there is no implied undertaking not to collect the existing debt in the mean time.

The following cases may therefore be regarded free of doubt, both upon principle and authority:

1. If the collateral is given in security at the time the debt is created, and as an inducement for the credit, and is a negotiable instrument, and still current, and is, in fact, negotiated to the creditor, so as to make him a party to the paper, and impose upon him the duty of demand and notice, according to strict commercial usage, the cases all agree, so far as they have comprehended the questions involved, that all equities of third parties are excluded: *Chickopee Bank vs. Chapin*, 8 Met. R. 40; *Griswold vs. Davis*, 31 Vt. R. 390; *Palmer vs. Richards*, 1 Eng. L. & Eq. R. 529. The declaration in *Williams vs. Little*, 11 New H. 66, and many other cases to the

contrary, is certainly not maintainable upon any fair view of the question, in that precise form of it.

2. If the collateral is not so negotiated as to make the creditor a party to the paper, and thus impose upon him the duty of making demand and giving notice, but making the creditor the mere agent of the debtor for the collection of the new bill or note, there is no ground of excluding equities in other parties, unless the creditor negotiates the security thus left in his hand to some third party, for value and while current: *Palmer vs. Richards*, 1 Eng. L. & Eq. R. 529; *Atkinson vs. Brooks*, 26 Vert. R. 569; *De La Chaumette vs. Bank of England*, 9 B. & C. 208; *Allen vs. King*, 4 McLean R. 128.

In such case the debtor, it would seem, may recall his collaterals, as the creditor, being his agent, is under his control. But this is certainly not the ordinary case of collateral security.

3. Where there is either an express contract with the creditor, that he shall, in consideration of the indorsement of the new bill, or note, as collateral, delay the collection of the existing debt until the maturity of the new security; or where such an understanding is reasonably to be presumed, from the facts and circumstances attending the transaction, and the delay is thereby obtained, there is no ground of question, since they stand upon the same footing in point of principle, as if an advance were made upon the credit of the new security: *Okie vs. Spencer*, 2 Wharton, 253; S. C., 2 Am. Lead. Cas. 232, and numerous cases there cited. These cases are so obvious upon principle, to the mind of all lawyers, that it would be a useless labor to attempt to render them more perspicuous. What is self-evident thereby becomes incapable of simplification, since

there is nothing more obvious by which it can be illustrated.

II. In coming to the inquiry, what is the precise legal implication, from the mere fact of receiving a negotiable security without surrendering any of the former securities for an existing debt, we encounter more perplexity.

1. This will depend, undoubtedly, to a great extent upon the course of doing business, and the commercial usages of the place. From all we can learn of this commercial usage in England, judging both from the reported cases and the elementary works, we infer that each new security is there credited as so much cash at the time it is received, and is charged to the debtor, in case of dishonor, with the addition of expenses attending the protest: *Poirier vs. Morris*, 20 Eng. L. & Eq. R. 103; *Bosanquet vs. Dudman*, 1 Starkie, 1. In this last case Lord Ellenborough said, "that whenever the acceptances exceed the cash balance the plaintiff holds all the collateral bills for value." Ex parte Pease, 19 Vesey, 25. In this mode of transacting business, the new notes, or bills, from time to time remitted to the creditor by his debtor, are, upon receipt, passed to his credit, and thus virtually discounted. This, we apprehend, is the usual course of doing business, in this country, where one has an open account with banks or bankers, and not unfrequently with brokers. How far it obtains with merchants it is not very certain, depending upon the nature and the amount of the dealings. But whenever the business is conducted in this form, there would be no difference as to the right of the creditor to hold the collaterals, whether they were taken in payment, or as security, or whether any advances in money were made at the precise time the collaterals were negotiated, since passing them to the credit of

the debtor as so much money, is strictly advancing the money upon them. This, we apprehend, is the true explanation of the reason why we find so little said, in the English cases, or treatises on bills and notes, in regard to these distinctions, which occupy so much space in our own reports. The case of *The Bank of the Metropolis vs. The New England Bank*, 1 How. U. S. R. 234, is precisely of this character, and the creditor was allowed to hold the collaterals free from all equities.

2. But in whatever mode the business is transacted, if we look carefully into the true principles involved, we shall come much to the same result. It has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms used are understood. If the term "collateral" is understood to import that the bills thus held are not taken on account of the existing debt, but only to be held until due, and, if paid, the amount to be applied, and, in the mean time, the creditor assumes no responsibility in regard to them, except as the mere agent of the debtor for collection, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished. The English cases in bankruptcy show very clearly that, in such cases, the title in the bills does not pass to the assignee, but may be retained by the correspondent: *Ex parte Pease*, 19 Vesey, 25; *De La Chaumette vs. The Bank of England*, *supra*.

3. But we apprehend this is not the ordinary acceptance of the term *collateral*, or collateral security; for it is no security at all. The etymology of collateral security indicates that it is something running along with, and, as it were, parallel to, something else, of a similar character. It is collateral to the origi-

nal indebtedness. It is, of course, a security, but it need not be in the precise form of the original. A bond may be secured by a collateral indebtedness in the form of a bill or note, and *vice versa*, and the collateral will always include other parties. But as far as the debtor is concerned, they are holden for the payment of the debt, and the creditor equally at liberty to pursue all in all legal modes, unless there is some express or implied restriction upon the title of the collaterals.

In this sense the title passes, by the negotiation of a bill or note, as collateral, the same as if the money were advanced. The only difference is, that this form is dispensed with, and the creditor retains his original security. Ordinarily, the collateral may not bind the same parties as the original security, or not all of them. In such cases the creditor will wish to retain the original, so as to lose none of his security. All that the word collateral imports is, that there is a prior or existing debt, and the collateral depends upon that, stands or falls with it, so far as the creditor is concerned.

4. But if the party takes the indorsement of a bill of lading, or of a bill of exchange, or note, he acquires no different rights as to the parties to these new instruments, whether he takes them in payment, or as collateral to an existing debt. In either case he becomes a party to the transaction or contract to the fullest extent, and, in the case of negotiable instruments, is bound to pursue the law merchant in making demand and giving notice, at the peril of making them his own, in actual exoneration of the party negotiating them.

5. In such cases it can be of little importance whether the original debt is treated as extinguished or not, since, if the debtor negotiate the note or bill, by

his own indorsement, which is the usual course, he is bound by such indorsement, and the double bond is of no essential importance. And if the creditor do not take steps to charge his debtor, as indorser, he makes the collateral his own in payment of his debt, and the result is the same, whether he is bound doubly or singly, since the release extinguishes both or one, as the case may be.

6. The mere giving of a negotiable note or bill for an existing debt, is only conditional payment, in any case, by the general law merchant, unless there is an express agreement that it shall extinguish the original debt. Upon the dishonor of the new note or bill, the creditor may sue the original debt, or the indorser of the new bill or note, at his election, so that the note or bill is but a collateral in any case, unless there is some special contract, or some special usage, as in the New England States, that the acceptance of the new note, or bill, shall, *prima facie*, extinguish the debt. These propositions are familiar, and scarcely require specific authority for their support. The cases are carefully collated, in 2 Am. Lead. Cas. 241-273.

III. Most of the conflict in the American cases, and all the English cases, will be readily reconciled by reference to the foregoing distinctions. And those anomalous cases in the American States, which will not come into these distinctions harmoniously, have been decided without properly apprehending the true principles involved, and must be left in their appropriate solitude until they are either abandoned, or else the course of business, or the principles of natural justice become so far modified, that they can be adopted by others.

1. In the case of *Poirier vs. Morris*, *supra*, Crompton, J., said: "Whether the bill was a collateral security, or whether it had the effect of suspending the pay-

ment of the antecedent debt, is quite immaterial." And Lord Campbell said: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." And in *Percival vs. Frampton*, 2 C. M. & R. 180, Parke, B., said: "If the note were given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration." The same rule is recognised in numerous other English cases: *Heywood vs. Watson*, 4 Bing. R. 496; *Bosanquet vs. Forster*, 9 C. & P. 659; *Same vs. Corser*, ib. 664; 2 Am. Lead. Cas. 250, 251. The rule is thus stated in the work last quoted, which has almost become a book of authority in the American courts. "The result of the English cases would seem to be, that accepting a note or bill payable at a future day, on account of a pre-existing debt, will suspend the debt until the note reaches maturity: Byles on Bills, 6 ed. 304." "The law is clear," said Lord Kenyon, in *Stedman vs. Groch*, 1 Esp. R. 4, "that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action for his original debt, until such note or bill becomes payable, and default is made in the payment." And the cases all agree that no recovery can be had in any case, upon the original debt, where the collateral, given in security, was indorsed while current, and is still outstanding: *Price vs. Price*, 16 M. & W. 232, 243. And in every case where the party accepts a collateral as security for a previous debt then due, there is no implied obligation not to negotiate the collateral before maturity. In nine cases out of ten that is done, among business men immediately, for the purpose of raising the

money, which should have been paid when the debt matured; so that the collateral is always received for the ease of the debtor, and it is not ordinarily received as a mere pledge, so that negotiating it would be a breach of good faith. On the contrary, the security, being negotiable, passes as money, and operates as payment conditionally, and is expected to be passed into the market at once.

All that is implied, then, by it being collateral, is, that there is no agreement or implication that the original debt is extinguished. The creditor intends to hold on to his original debt and all other securities. The new security, then, is collateral to the previous debt; but the new security, as between the parties to it, and the creditor, is not affected by it being collateral to the previous debt, any differently from what it would be if it were received in extinguishment of it. It is negotiated in the fullest manner, and subject to the law merchant, and with no restrictions upon its further negotiation. We think, therefore, that the English courts have taken the true view in saying that such paper passes for value, and in the ordinary course of business, and excludes all existing equities, without regard to the understanding, agreement, or implication, as matter of fact, that the creditor should delay the enforcement of the existing debt until the maturity of the new security. And that they are also right in saying, that it makes no difference in principle, or legal effect, whether the existing debt is extinguished or not, or whether the original evidence of debt, or the existing securities, are surrendered or not: *Kearslake vs. Morgan*, 5 Term R. 513; *Baker vs. Walker*, 14 M. & W. 465; *Belshaw vs. Bush*, 11 C. B. 191, 200; *Ford vs. Beech*, 11 Q. B. 852, 873. These transactions, indorsing negotiable securities on account of previous debts, without

special agreement as to the effect, are there treated as "necessary exceptions to the general rules of law, in favor of the law merchant." This rule has been adopted in this country by the national tribunal of last resort: *Swift vs. Tyson*, 16 Pet. R. 1. This decision was made upon the maturest consideration, and has prevailed in most of the States, and is expressly extended to collaterals: *Bank of the Metropolis vs. New England Bank*, *supra*; *Petrie vs. Clark*, 11 Serg. & R. 377, as early as 1824 adopts almost precisely the same view, except that it is not assumed, as matter of necessary implication, that one who accepts security for a debt will, to some extent, change his conduct in consequence. See also *Walker vs. Geisse*, 4 Wharton, 252. In *Holmes vs. Smith*, 16 Maine, 177, it is decided that where negotiable paper is taken in payment of a previous debt, it will exclude all equities in other parties. To the same extent is *Williams vs. Little*, *supra*. The same view is adopted in *Carlisle vs. Wishart*, 11 Ohio, 172; *Norton vs. Waite*, 20 Maine, 175; *Bostwick vs. Dodge*, 1 Doug. Mich. R. 413; *Bush vs. Peckard*, 3 Harrington R. 385; *Brush vs. Scribner*, 11 Conn. R. 388; *Barney vs. Earle*, 13 Alabama R. 106. In these cases, except *Williams vs. Little*, the question did not arise in regard to negotiable paper being taken as collateral security. But in many of the States, as well as in *Swift vs. Tyson*, and *The Bank of the Metropolis vs. The New England Bank*, *supra*, all such distinction is disclaimed, and held to have no existence in principle. *Reddick vs. Jones*, 6 Iredell, 107; *Gibson vs. Conner*, 3 Kelley, 47; *Valette vs. Mason*, 1 Smith 89, (Indiana); *Allaire vs. Hartshorn*, 1 Zabriskie, 665; *Blanchard vs. Stevens*, 3 Cush. R. 162. The fallacy of supposing that the creditor is in the same condition after having failed to enforce the collection of his col-

laterals, as if he had not received them, is here placed in the clearest light by Dewey, J.: "If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities, or, perhaps, payment in money. It is a fallacy to say, that if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed not proved, and from the very nature of the case is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue, or apparently dishonored, and without notice, actual or constructive, of want of consideration, or other defence thereto, whether in payment of a precedent debt, or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defence might not have been effectual as between the original parties." And the Supreme Court of Rhode Island, after very careful and thorough examination of the cases, have recently come to the same conclusion: *Bank of the Republic vs. Carrington*, 5 R. I. R. 515; see also *Atkinson vs. Brooks*, 26 Vt. R. 569. It scarcely seems necessary to enumerate the cases in New York and some other States which have followed their lead, where it has been held that paper negotiated as collateral on account of a previous debt, is not taken for value and is subject to all equities. We think it most unquestionable that the New York courts are right in saying there is no distinction, in principle, between taking such paper in payment and as collateral

to a pre-existing debt. But the truth undoubtedly is, that either forms a good consideration, and the title of the creditor depends upon the *character* of the paper, and is an exception to all rules attaching to the delivery of *other property* as security for a debt.

The main point of the decision in the very case before us, that the trust, which unquestionably attached to the property which formed the consideration of the bills, could not attach to the bills after they had been bona fide negotiated in the market, although merely between debtor and creditor, and no new advance made specifically on such account, goes exclusively upon the peculiar quality and character of negotiable paper as to the transmission of its title. It passes in the market as money. No man is bound to make any inquiry into the title of the holder. And even carelessness, short of bad faith, will not defeat one's title to such paper, taken for value: *Goodman vs. Harvey*, 4 Ad. & Ellis, 870, overruling *Gill vs. Cubit*, 3 B. & Cr. 466. And whether one advances money and then takes the money in payment of his debt, or takes the note or bill on account of the debt, or as collateral security, is not material, either in fact or in law. And, to be consistent, we must either adopt the New York rule that, in both cases there is no value given for the new note or bill, or else insist that value is given in both cases.

It is impossible, as it seems to us, to successfully contend for the contrary, unless where the previous debt is not due, or the new security is such that no trust is reposed in it, and these are exceptional cases. In every other case, the creditor *will* conduct differently on account of the new security, and *will* delay the collection of the previous debt until the result of the new security is determined. And then it is impossible

to restore the creditor to his former position, since time is a very important matter in commercial transactions. We trust that, before many years, all our American courts will adopt the sensible views of the English courts upon this question, and not expend so much strength hereafter in determining the precise difference between receiving a note or bill "on account of," "in payment of," "as collateral to," and "as security for" an existing debt, since no

one, whose perceptions were not rendered very acute by the study of refinements and hair-breadth distinctions, would ever dream that there could be any essential difference in the rights of the creditor to have the full benefits of the new securities, and of "all the collaterals," in the language of Lord Ellenborough in *Bosanquet vs. Dudman*, *supra*, until he obtained full satisfaction of his debt.

I. F. R.

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*In the Court of Common Pleas of Erie County, Pennsylvania.*

WALLACE ET AL. vs. WALLACE ET AL.

1. A will which authorizes executors not only to sell at their option, but also to make valuation, division, and allotments of the estate devised, and to make deeds of conveyance therefor, breaks the descent, and vests the estate in the executors, and the heir at law cannot maintain ejectment therefor.
2. Where a plaintiff in ejectment claims, not as heir at law, but as devisee under a will which authorizes the executors not only to sell, but also to make a valuation and allotment of the estate devised, she must show that these provisions of the will have been complied with, so that her portion or purpart may be known and distinguished from that of other devisees mentioned in the will.
3. When an estate is devised to trustees, they to pay over or convey to the *cestui que trust* the one-half part of what they should receive of the estate, and the yearly proceeds of the other half during her natural life, the trustees are the repository of the title for her benefit, and she cannot maintain ejectment for it.
4. If executors or trustees, created by a will, are authorized to make division and allotment of real estate, and neglect or refuse to do it, the remedy for the *cestui que use* is in the Orphans' Court.

This was an action of ejectment for about 4000 acres of land in Erie county, brought by Elizabeth Wallace and J. W. Wall, trustee of Elizabeth Wallace, against John William Wallace and others, No. 149, of May Term, 1860, in the Court of Common Pleas of Erie county, Pennsylvania. The plaintiffs, to sustain their action, offered in evidence a copy of the will of Mrs. Tace Wallace, dec'd, late of Burlington, New Jersey, from the Prerogative Court of said